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No. 92-1368

In the Supreme Court of the United States

OCTOBER TERM, 1992

JACQUELINE B. BRUNEAU, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether federal law limits petitioner's recovery of the uninsured portion of her deposits in a failed bank to her pro rata share of the receivership assets of that bank.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 981 F.2d 175. The opinion of the district court (Pet. App. B1-B11) is reported at 785 F. Supp. 585.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1992. The petition for a writ of certiorari was filed on February 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1988, petitioner opened three accounts at Bankers Trust of Louisiana with funds totalling $223,125.76. According to petitioner, an employee of Bankers Trust incorrectly advised her that the Federal Deposit Insurance Corporation (FDIC) would insure each of the accounts for up to $100,000. After Bankers Trust failed and the Office of the Comptroller of the Currency appointed the FDIC as receiver, petitioner filed a claim for the funds she had deposited. The FDIC paid her $100,000 (the insured portion of her deposits) and issued her a Receiver's Certificate for the remaining amount due ($123,437.53, including interest), which entitled her to share pro rata with other uninsured depositors and general creditors of Bankers Trust. She subsequently received dividends of $85,037.35 from the receivership estate. Pet. App. A2-A3; B2-B4.[1]

2. Petitioner brought this action against the FDIC as receiver for Bankers Trust, seeking to recover the uninsured portion of the three certificates of deposit.[2] Petitioner argued that oral

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[1] At the time the case was submitted to the court of appeals, petitioner had received $72,754.08. See Pet. App. A3. The FDIC has advised us that it has made subsequent disbursements to petitioner of $3,234.06 (on December 31, 1992), $8,964.03 (on April 2, 1993), and $85.18 (on April 6, 1993). The outstanding amount on her uninsured deposit thus stands at $38,400.18.

[2] Petitioner also sued various individual defendants, whom she alleged were directors, officers, controlling persons, or employees of the bank. Petitioner voluntarily dismissed some of those defendants, and the district court dismissed the claims against the remaining defendants without prejudice. Pet. App. B10-B11. The court of appeals affirmed. Pet. App. A5-A9.

representations made by an employee of Bankers Trust had induced her to deposit funds at a time when the former management of the bank knew or should have known that the institution was hopelessly insolvent, and that she therefore was entitled to recover the entire amount of her deposits. The district court granted the FDIC's motion for summary judgment and held that petitioner's claims were barred by federal law. Pet. App. B1-B11. First, the court rejected petitioner's reliance on the so-called "hopeless insolvency" doctrine. Relying on *Downriver Community Federal Credit Union* v. *Penn Square Bank*, 879 F.2d 754 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990), the court explained that the federal statutory scheme for the distribution of assets of failed banks limited the liability of the FDIC as receiver with respect to uninsured depositors to the depositor's pro rata share of the assets of the receivership estate. Pet. App. B5-B7 (citing 12 U.S.C. 1821(i) (Supp. III 1991)).

Alternatively, the court ruled that petitioner's reliance on misrepresentations by bank employees was barred by this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its statutory counterpart, 12 U.S.C. 1823(e) (1988 & Supp. III 1991). The court explained that a claim based on such misrepresentations could prevail against the receiver only if the misrepresentations appeared in an agreement signed by Bankers Trust and made an official record of the bank. Because petitioner could not establish those conditions, the claim failed. Pet. App. B7-B9.

3. The court of appeals affirmed. Pet. App. A1-A9. First, the court held that *D'Oench, Duhme* and

Section 1823(e) bar petitioner's claim, because it rests on alleged misrepresentations by bank personnel and because petitioner failed to show the existence of an agreement that satisfied the statutory requirements of Section 1823(e). The court noted that petitioner's "entire case rests on the theory that the officers of the bank committed a fraud by allowing her to deposit money when they knew the bank was insolvent" and that *D'Oench*, *Duhme* and Section 1823(e) "are directly implicated" by that theory. Pet. App. A4-A5. The court also rejected petitioner's reliance on the hopeless insolvency doctrine, stating that the district court's opinion "ably explains the effect of the hopeless insolvency doctrine * * * and everything else relative to this essentially frivolous ground of appeal." Pet. App. A5.

ARGUMENT

1. Petitioner first argues (Pet. 6-9) that the hopeless insolvency doctrine requires the FDIC to return to her the entire amount of the funds deposited in the failed institution, even if that amount is greater than her pro rata share of the receivership estate. We disagree.

Congress has enacted a detailed statutory scheme describing the manner in which the FDIC shall dispose of the assets of an institution for which it serves as receiver. Under those provisions, the FDIC is obligated to pay "a ratable dividend" of the assets of the receivership estate "on all such claims as may have been proved to [its] satisfaction or adjudicated in a court of competent jurisdiction." 12 U.S.C. 194. Moreover, under 12 U.S.C. 1821(i)(2) (Supp. III 1991), the maximum liability of the FDIC as

receiver is the amount the creditors would have received if the FDIC had liquidated all assets and distributed them pro rata to the creditors. Finally, 12 U.S.C. 1821(i)(1) (Supp. III 1991) contains an express preemption provision, indicating that the allocation of liability established by Section 1821(i) governs "[n]otwithstanding any other provision of Federal law or the law of any State." Collectively, those provisions establish a system under which there is an overwhelming presumption that the FDIC will distribute funds to disappointed depositors on a pro rata basis. Because petitioner's attempt to gain preferential treatment over other depositors flies in the face of that presumption, the court of appeals properly rejected her claim.

The sole federal decision on which petitioner relies (Pet. 6-7) to support her claim is *Downriver Community Federal Credit Union* v. *Penn Square Bank*, 879 F.2d 754 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990). In that case, however, the court of appeals rejected a depositor's attempt to secure preferential treatment based on the failed bank's alleged misrepresentations made before appointment of the FDIC as receiver. 879 F.2d at 765. To be sure, the *Downriver* court suggested that such a claim might prevail in some circumstances, *id.* at 762-763, but given the ultimate result of that case, the suggestion was not necessary to the decision.[3] Because petitioner

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[3] In any event, even the *Downriver* opinion makes clear that relief would be available only to any individual who could establish "a false and fraudulent representation made specifically to [that individual]." 879 F.2d at 764. As discussed below, the *D'Oench, Duhme* doctrine bars any attempt by

does not identify any decision of a federal court holding that the relief she seeks would be appropriate, there is no occasion for review by this Court.

2. Petitioner also argues (Pet. 9-13) that the lower courts erred in finding her claim barred by *D'Oench, Duhme* and 12 U.S.C. 1823(e) (1988 & Supp. III 1991). We disagree. In *D'Oench, Duhme*, this Court refused to allow a borrower sued by the FDIC on a note it acquired as receiver of a failed bank to assert as a defense the claim that the note was given "with the understanding that no suit would be brought thereon." 315 U.S. at 456. The Court adopted a federal common-law rule allowing federal banking regulators to enforce notes notwithstanding certain defenses not apparent on the face of the note, relying on the need of regulators to determine the "genuineness of assets ostensibly held by a bank." *Id.* at 460.

The rationale of that decision—as supplemented by its statutory counterpart 12 U.S.C. 1823(e) (1988 & Supp. III 1991)—is squarely applicable here, where petitioner attempts to assert a claim against the receivership estate based on a misrepresentation allegedly made by an employee of the failed institution. The FDIC could not have learned of the misrepresentation by reviewing the books and records of the failed institution, and thus, if petitioner prevailed, the FDIC would be subjected to a deposit liability that was not revealed by the institution's records. Put another way, petitioner—by depositing funds in an account based on the understanding that they would

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petitioner to establish such a representation in this case. Accordingly, petitioner could not prevail even under the dictum articulated in *Downriver*.

have certain insurance protection, but without securing an official agreement to that effect—"lent h[er]self to a scheme or arrangement whereby the banking authority * * * was likely to be misled," 315 U.S. at 460. In those circumstances, it is entirely appropriate to hold petitioner's claim barred.

Contrary to petitioner's suggestion, petitioner cannot evade the *D'Oench, Duhme* doctrine by couching her claim as one for a misrepresentation regarding the treatment of her account, rather than an "agreement" regarding the treatment of her account. That argument would eviscerate *D'Oench, Duhme*, because it would allow a depositor to avoid the doctrine simply by characterizing the employee's statement as a misrepresentation (on which the depositor relied, and with which the depositor apparently agreed) rather than a mutual agreement. Cf. *Langley* v. *FDIC*, 484 U.S. 86, 90-93 (1987) (holding that 12 U.S.C. 1823(e) (1982) applies to misrepresentations, as well as agreements).

Nor can petitioner avoid the rule by suggesting that her claim is established on the records of the bank because those records establish the hopelessly insolvent state of the institution. Under that theory, *every* depositor would be entitled to the return of all funds deposited after the bank became insolvent, a result that would make orderly disposition of the assets of a failed institution impracticable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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